

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DAVID LEWIS OLIVER AND BARBARA
ELLEN OLIVER,

Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC;

Defendant.

Case No. 3:12-cv-05374-BHS

**DEFENDANT OCWEN LOAN
SERVICING, LLC'S REPLY TO
PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS**

[Fed. R. Civ. P. 12(b)(6)]

**NOTE ON MOTION CALENDAR:
DECEMBER 21, 2012**

COMES NOW Defendant Ocwen Loan Servicing, LLC, ("Ocwen") and replies to Plaintiffs David Lewis Oliver and Barbara Ellen Oliver's (the "Plaintiffs") Response to Motion to Dismiss as follows:

I. INTRODUCTION

Plaintiffs' second attempt to allege violations of the Fair Debt Collection Practices Act ("FDCPA") and the Real Estate Settlement Procedures Act ("RESPA") fail because Ocwen is

1 not a debt collector under the FDCPA and because Plaintiffs admit that Ocwen responded to
 2 their alleged Qualified Written Request (“QWR”). Moreover, even if the court assumes that
 3 Ocwen is a debt collector, Plaintiffs have not alleged how the acts set forth in their complaint
 4 were abusive tactics in violation of FDCPA.

5 For the reasons set forth herein and in the moving papers, Ocwen’s Motion to Dismiss
 6 should be granted and Plaintiffs’ complaint dismissed with prejudice.

7 **II. LAW AND ARGUMENT**

8 **A. Ocwen is Not a “Debt Collector”.**

9 Plaintiffs still argue that because the debt was in default when the loan was service
 10 transferred to Ocwen, Ocwen is a debt collector. Plaintiffs’ argument fails because Plaintiffs’
 11 FAC is premised on the fact that that the loan was current at the time the alleged violations
 12 occurred and because Ocwen acquired the debt to service the mortgage loan not for the sole
 13 purposes of collecting a debt.

14 Case law distinguishes a debt collector and a loan servicer, even when the loan was in
 15 default when the loan was servicer transferred. The act of servicing a loan is distinct from that
 16 of collecting a debt. Loan servicers engage in a long-term relationship with a borrower,
 17 whereas a debt collector is hired by a third party to collect a one-time obligation. As one
 18 Washington federal court recently observed, “The Act’s target are independent debt collectors
 19 of “past-due” or “delinquent” debts, who, unlike creditors, are not “restrained by the desire to
 20 protect their good will when collecting past due accounts,” since “independent collectors are
 21 likely to have no future contact with the consumer and often are unconcerned with the
 22 consumer’s opinion of them.” *Walcker v. SN Commercial, LLC*, CV-06-009-RHW, 2006 WL
 23 3192503 (E.D. Wash. Nov. 2, 2006) *aff’d on other grounds*, 286 F. App’x 455 (9th Cir. 2008).

24 Alleging that the loan was transferred “in default” is insufficient to turn a loan servicer
 25 like Ocwen into a “debt collector” under the Act. *Schlegel v. Wells Fargo Bank, N.A.*, 799 F.

1 Supp. 2d 1100, 1106 (N.D. Cal. 2011). Rather, under the FDCPA, a debt transferred in default
2 does not automatically turn a creditor into a debt collector unless the debt was acquired “solely
3 for the purpose of facilitating the collection of debt for another.” 15 U.S.C. 1692(a)(4). The
4 *Schlegel* Court explored this requirement in depth, dismissing the plaintiff’s FDCPA claim
5 because the mortgage lender’s collection activities were “more like debt servicing” than debt
6 collecting. Even though the plaintiff’s loan was in default when it was transferred to the
7 defendant, the Court found it was not transferred solely for the purpose of debt collection, and
8 as such, the FDCPA did not apply. *Id.*; citing court in *Hulse v. Ocwen Fed. Bank*, 195
9 F.Supp.2d 1188, 1203 (D.Or.2002).

10 Here there is an ongoing relationship, as evidenced by the allegations that Ocwen has
11 been servicing Plaintiffs’ loan since 2006 and has continued to service the loan. [FAC ¶ 9].
12 Plaintiffs’ also admit that when their Chapter 13 Plan was completed on February 2, 2011,
13 Plaintiffs’ loan was current. [FAC ¶ 19]. The claims asserted by Plaintiffs are all based on
14 actions taken after Plaintiffs’ Chapter 13 plan was completed and the loan was current. [FAC
15 ¶ 16-25].

16 Even if the Court finds that Ocwen is a debt collector, the Plaintiffs’ claim fails because
17 Plaintiff has failed to allege that he acts amounted to abusive tactics. Under the FDCPA, it is
18 unlawful for debt collectors to use abusive tactics while collecting debts of another. 15 U.S.C.
19 1692. The allegations set forth in the FAC do not amount to abusive tactics. At most the acts
20 alleged constitute an accounting dispute. [FAC].

21 Plaintiffs’ FDCPA claim fails to allege a claim against Ocwen and should therefore be
22 dismissed with prejudice.

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B. Plaintiffs' Second Claim Fails Because Plaintiffs Still Have Not Alleged a Viable Claim for Violation of RESPA.

Plaintiffs argue that their RESPA claim should not be dismissed because Ocwen did not respond to a Qualified Written Request ("QWR") and because Ocwen provided inaccurate information to the credit reporting agency. Both arguments fail because Ocwen did respond to the QWR and there are no ultimate factual allegations of improper credit reporting.

First, Ocwen responded to Plaintiffs' alleged QWR dated January 11, 2011, on January 28, 2011. [FAC ¶ 23]. While Plaintiffs may not have been satisfied with the response, Ocwen did respond. There are no allegations that Plaintiffs sent a second QWR or that Ocwen failed to respond to a second QWR.

Moreover there are no specific facts articulated as to what was inaccurately reported to the credit bureaus. The only allegation pertaining to the alleged reporting is a boilerplate allegation that Ocwen reported false information. Plaintiffs' claim pursuant to RESPA is insufficiently alleged and should be dismissed with prejudice.

III. CONCLUSION

For the above-stated reasons as well as those set forth in the moving papers, Defendant Ocwen respectfully request the Court to grant Ocwen's Motion to Dismiss.

Dated: December 21, 2012

HOUSER & ALLISON
A Professional Corporation

/s/ Robert W. Norman
Robert W. Norman, Jr.
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DECLARATION OF SERVICE

The undersigned declares as follows:

On December 21, 2012, I served the foregoing document on the following individual(s) through the CM/ECF System to the e-mail addresses listed below or by U.S. Mail, Postage Prepaid:

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